

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





# 76-7557 & 7572 & 7589

To be argued by  
DAVID W. COHEN

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

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ANTHONY PEREZ, JR.,

*Plaintiff-Appellant-Appellee,*

*against*

MUHAMMAD ALI a/k/a Cassius Clay,

*Defendant and Third-Party Plaintiff-  
Appellee-Appellant,*

*against*

AMERICAN BROADCASTING COMPANIES, INC.  
and ABC SPORTS, INC.,

*Third-Party Defendants-  
Appellees-Appellants.*

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### BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF APPELLEE-APPELLANT

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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ANTHONY PEREZ, JR., :  
Plaintiff-Appellant-Appellee, :  
-against- : Docket Nos. 76-7557  
MUHAMMAD ALI, a/k/a Cassius Clay, : 76-7572  
 : 76-7589  
Defendant and Third-Party- :  
Plaintiff-Appellee-Appellant, :  
-against- :  
AMERICAN BROADCASTING COMPANIES, INC. :  
and ABC SPORTS, INC., :  
Third-Party Defendants- :  
Appellees-Appellants. :  
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BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF  
APPELLEE-APPELLANT MUHAMMAD ALI

Preliminary Statement

This brief is submitted by defendant and third-party plaintiff appellee-appellant Muhammad Ali ("Ali") in opposition to the appeal of plaintiff-appellant-appellee Anthony Perez, Jr. ("Perez") from a judgment of the United States District Court for the Southern District of New York (Pollack, J.) entered on a jury verdict dismissing the defamation action brought by Perez against Ali (A 697)\*. This brief is also submitted in support

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\*References to the Joint Appendix are to "A"; references to the transcript of the trial in the Joint Appendix are to "Tr."; and references to Appellants Brief on this appeal are to "App. Br. p. ".



of Ali's appeal from the Court's dismissal of Ali's counterclaims for physical injury (Tr. 551). Ali is not appealing from the jury's dismissal of his counterclaim for defamation against Perez.

The controversy between Ali and Perez arose from remarks each made about the other after Ali's successful defense of his heavyweight championship boxing title in a bout against Chuck Wepner ("Wepner") in which Perez acted as referee. Prior to trial, the parties stipulated that for the purposes of the events in question each was a public figure. After a five-day trial, the jury, in a general verdict, dismissed the defamation claims of each party.\*/The Court refused to submit to the jury Ali's counterclaims for personal injury he sustained from foul blows Perez permitted Wepner to strike during the bout.

On this appeal, Perez' counsel viciously attacks the trial court, accusing the Court of prejudice against his client, a Puerto Rican, of having prejudged the facts of the case in favor of Ali and of demonstrating this bias throughout the trial by actively assisting Ali's defense and "exuding contempt" for Perez and Perez' counsel (App. Br. pp. 1-2). Moreover, Perez' counsel accuses Ali's trial counsel of unprofessional conduct by actively misleading the Court as to the evidence in the record so

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\*/Ali's claims over against third-party defendants-appellees-appellants were dismissed, and the counterclaims against Ali of the third-party defendants were dismissed for failure of proof. (A 698).



that the Court refused to correct "material omissions in its charge" (App. Br. p. 2).

None of these accusations has a shred of truth. Reduced to its essentials, Perez' complaint is, quite simply, that the jury was wrong. As this brief will demonstrate, the evidence at trial overwhelmingly supported Ali and there is no merit to Perez' claim, which, regrettably, is expressed in a series of totally unwarranted attacks on Court and counsel.

Ali's appeal is from the Court's dismissal of Ali's second and third counterclaims for physical injuries suffered from deliberate and willful foul blows which Perez permitted Wepner to inflict. There was ample evidence in the record on which these claims should have gone to the jury, and the Court's refusal to submit them was error.

#### Statement of Issues

1. Whether the charge of the Court below was proper;
2. Whether the trial was conducted fairly; and
3. Whether the Court below erred in dismissing Ali's second and third counterclaims.

#### Statement of Facts

##### 1. The Wepner Fight

On March 24, 1975, Ali successfully defended his



heavyweight boxing championship title in Cleveland, Ohio, defeating Wepner in a technical knockout in the 15th round. The referee for the fight was Perez.

The testimony at trial was that prior to the Wepner fight (and even today) Perez was regarded as a highly competent professional boxing referee (Tr. 504, 538, 425). (Indeed, since the Wepner fight and the "dispute" with Ali, Perez has refereed at least two other championship bouts (Tr. 163-5)). With two exceptions, he was described by an expert witness, for the defense, James Jacobs ("Jacobs"), as a "perfect referee" (Tr. 522). Perez was most clearly not a perfect referee in the Ali-Wepner fight (Tr. 539, 465).

It was well known before the fight that Wepner was, by his own admission, a "roughhouse" fighter (Tr. 34). Wepner's style was to attack an opponent with rabbit punches and kidney punches (Tr. 447, 280), neither of which is permitted under boxing rules and both of which can cause serious damage to the opposing fighter (Tr. 173, 524)\*.

Ali, on the other hand, is known as one of the finest professional boxers who has ever fought. It is not and never has been Ali's style to engage in "roughhousing" or deliberate rabbit or kidney punching (Tr. 337).

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\*After making these admissions in cross-examination, Perez testified:

"Q: Mr. Perez, as a referee, isn't it your duty to protect the physical safety of the boxers in the ring?

A. Yes, sir." (Tr. 173)



Ali testified that he first learned that Perez was the referee for the Wepner fight when Ali "stepped in the ring and saw him" (Tr. 249). Earlier that day, however, Ali had received an anonymous telephone call, informing him that the referee had been reached (Tr. 461); Ali mentioned the call to his trainer, Angelo Dundee ("Dundee"), who dismissed it as a "crank call" and told Ali to "forget about it" (Tr. 461-2).

According to Dundee, who has seen "a couple of thousand" fights, the Wepner fight was "the dirtiest fight I ever saw" (Tr. 446). Ali testified that, by his count, Wepner hit Ali at least 154 times with rabbit punches (Tr. 292) and with countless kidney punches (Tr. 374). Ali further testified that Wepner's foul blows were delivered intentionally (Tr. 289) and that by the second round of the fight Ali's head was hurting from Wepner's rabbit punches (Tr. 338). Indeed, even in the first round, after Wepner's first series of foul blows, Ali protested to Perez, asking him to discipline Wepner (Tr. 332)\* and to protect Ali from Wepner's illegal tactics, as Perez had an obligation as referee to do (Tr. 173). Perez did nothing (Tr. 344-5).

The video-tape of the Wepner fight was shown four times to the jury. Ali and Perez commented in detail on almost

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\*A referee has a duty to warn the fighter, usually by momentarily stopping the round, motioning to the crowd as to the infraction and directing the fighter not to foul again. (Tr. 43) The round can be taken away (Tr. 44) and, if the fouls do not stop, the fighter can be disqualified (Tr. 45).



every round. At trial Perez denied repeatedly that Wepner was inflicting intentional foul blows and insisted that Ali was the one doing it (Tr. 114). Ali's testimony was exactly the contrary, and the jury had ample opportunity to weigh the credibility of Perez' comments, and to judge the reasonableness of Ali's protests to Perez during the fight and of Perez' failure to take action.

Ali testified that in round 8 of the fight Wepner intentionally tried to "knee [Ali] in the groin area" (Tr. 352-5) -- Wepner "kicked right up" (Tr. 354); Dundee called it "a deliberate foot kick" (Tr. 455). Indeed, Dundee testified that during the fight Wepner employed: "Every foul that could be declared a foul, like rabbit punches, kidney punches, butting" (Tr. 450).

Incredibly, Perez did not take away a single point from Wepner for his illegal tactics during the fight (Tr. 178).

In round 9, Wepner stepped on Ali's foot, causing Ali to fall to the canvas. Despite ringside protest from Dundee that: "It was no knockdown. He stepped on his foot" (Tr. 451), Perez ruled it a "clean knockdown" (Tr. 179). At trial, Perez not only testified that it was a "clear point" (Tr. 179), but persisted in this view even after being shown a photograph of the "knockdown", which unquestionably shows Wepner standing with his left foot on Ali's right foot, with Ali falling backwards (A 45).

Expert Jacobs summed up Perez' performance in the Wepner fight:

"I don't believe that anyone, in seeing the 15 rounds of Ali-Wepner and being very familiar with the way Mr. Perez refereed, could conceive that over that period of one hour, that he could ever permit the outlandish fouling, the unbelievable conduct that took place in that ring. He would never permit it. I believe it was a dishonest performance.

\* \* \* \*

"I only have this opinion, based on what I saw in the Ali-Wepner fight, and based on the fact of my experience in 16,000 fight films that I have.

"In all the fights I have ever seen, I have never seen such an outrageous performance by a referee." (Tr. 538-9) (emphasis added.)

## 2. The Frazier Fight

This was not the first time Perez' conduct in an Ali fight was the subject of controversy. Perez was the referee in the second Ali-Frazier fight on January 28, 1974, in Madison Square Garden. Ali testified, and Dundee confirmed, that before the fight Ali had received an anonymous telephone call warning him that the referee had been reached (Tr. 263-4; 461-3). Ali disregarded it, just as he would later do with the telephone call prior to the Wepner fight (Tr. 285). In fact, Ali testified he paid no attention to it until "after what happened" in the Wepner fight (Tr. 285).

More importantly, in round 2 of the Ali-Frazier fight, with nineteen seconds remaining, Ali connected with a powerful



blow that staggered Frazier. The video-tape of this round was shown to the jury (Tr. 85-6), and Ali testified that you "could see [Frazier's] knees wobble. He was falling backwards" (Tr. 265). Jacobs testified that after the blow Frazier was in "desperate trouble" (Tr. 520). But before Ali could hit him again, Perez stopped the round!\*/There was no bell, and the cornerpost ring lights, which go on simultaneously when the bell rings, were not lit. After four or five seconds, Perez called the fighters back and the round continued (Tr. 89). The fight lasted twelve rounds and Ali was judged the winner.

At trial, Perez insisted that he had heard "what sounded to me like a bell" (Tr. 89). However, on cross-examination, Perez could not explain his having stopped the round without seeing the ring lights, which he had been told repeatedly to watch (Tr. 242-3). Perez admitted that he could not recall an instance at Madison Square Garden where the lights failed, or where the bell worked but the lights did not (Tr. 200). Perez continued his denials in the face of a photograph which showed him looking directly at the ring post with the lights off at the moment he stopped the round (Tr. 193). In fact, when the video-tape was played to the jury, Perez admitted he could not hear any bell ring (Tr. 233).

Ali testified that since he won the Frazier fight, despite Perez' conduct, he thought nothing more of it (Tr. 285). After the

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\*Perez' counsel incorrectly states that Jacobs testified that a knockout in 20 seconds was impossible "in view of the three knockdown rule" (App. Br. p.7). It takes only 10 seconds for a fighter to be counted out; the "three knockdown" rule applies only to a technical knockout, where the fight automatically ends after a fighter is knocked down three times in one round.

Wepner fight, however, Perez' conduct in the Frazier fight took on more significance, particularly in light of the telephone calls which preceded each fight (Tr. 285).

### 3. The Post-Fight Press Conference

#### a) Perez' Post-Fight Interview

Immediately after the Wepner fight, and before there had been one word by Ali (Tr. 180), Perez gave an interview to reporters. When asked about rabbit punching, Perez told the press that he saw a few "by both sides," (Tr. 177) but he just "warned" the fighters (Tr. 177) and did not take any points away because "they were both doing it" (Tr. 178). When asked about the "knock-down" in round 9, Perez told the press it was a "clean knockdown" because Ali "got hit clean and he tripped a little bit on his foot, too, but it was a clean shot" (Tr. 179). Once again, Perez stuck to this version at trial, despite his testimony on direct examination that he does not watch the fighters' feet while refereeing: "I have to keep looking at the action from upstairs. If I look at the feet, I could miss something at the heads" (Tr. 157), and despite clear evidence in the photograph that Wepner had his foot on top of Ali's as Ali fell to the canvas (A 45).

#### b) Ali's Post-Fight Interview

Ali heard part of Perez' press conference and followed



Perez to the microphone (A 676)\*. Ali was asked "what type of job do you think Perez did?" (A 676). Ali replied that Perez was a "dirty referee" to allow Wepner to strike so many illegal blows without Perez "saying nothing" (A 677). Ali protested: "My head is hurting, my whole neck is hurting. I got 2 lumps back here" (A 678). He referred to the Frazier fight:

"I had Joe Frazier, I had Joe Frazier knocked out. I had Joe Frazier knocked out and he didn't even see it. He [Perez] pretended the bell rang . . . ." (A 677).

Finally, Ali said:

Question by Press: "Ali, did he [Wepner] have to rabbit punch in order to last 15 rounds with you?"

Ali: "No. . . he was butting too. He was getting his head and butting. He tried to kick me one time; I fell and brought my foot here (indicating where) " (A 678).

Ali concluded by protesting what he termed "racist activity" and testified that he intended to "preach a sermon on injustice and racism and evil that is allowed to be practiced at that time " (Tr. 258).

#### 4. Perez' March 25, 1975 Interview

The next day, Perez gave another interview to the press.

This time, Perez stated:

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\*/The tape of Ali's remarks at this press conference was not initially introduced by plaintiff on the direct examination of Perez and these remarks are not alleged as defamatory in the Complaint (A 3). On redirect examination of Perez, over objection, the Court allowed Perez' counsel to play the tape of Ali's remarks for the jury (Tr. 241).

"He [Ali] purposely did the rabbit punching. Chuck did not do it purposely. If there is one man who fought dirty last night, I think it was Ali.

"A clean knockdown. Ali tripped on his own feet but he went down from the effect of the punch, in my opinion. He's just embarrassed because a man like Wepner knocked him down."  
(A 46; Tr. 221)

5. Perez' Telephone Call to Cosell

A few days later, Perez telephoned Howard Cosell. Perez had learned that Ali was scheduled to appear on a broadcast on March 29, 1975 to review the Wepner fight and, particularly, the controversy surrounding the refereeing. Perez once again presented his side of the controversy (Tr. 489-90). Perez repeated that Ali was "embarrassed" because Ali had done so poorly against Wepner and further told Cosell that Ali "outdid Chuck Wepner in the rabbit punching" and that Ali "did it purposely and flagrantly" (Tr. 224-5).

6. Ali's Statements on Wide World of Sports

On March 29, 1975, a broadcast was made of a video-tape of Ali's appearance on ABC television's Wide World of Sports show.\*/  
Ali appeared on the show, among other things, to review a tape of Ali's fight with Wepner. The interviewer was Howard Cosell. During that show, the tape of the Wepner fight was played. Following are excerpts from the dialogue between Cosell and Ali in which the

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\*/The video-tape of the program was recorded on March 28, 1975.



alleged defamatory remarks were spoken:

"MR. COSELL: Tony Perez says you outdid Chuck Wepner --

"MR. ALI: Outdid him how?

"MR. COSELL: In rabbit punching.

"MR. ALI: He outdid me. He started the rabbit punching, and I did it since the referee wouldn't take the law into his hands, which is his job -- since he wouldn't do it, then I did it. Then he said both of us did it. And then, after I quit -- now if you watch that whole fight, all through the fight, after the beginning, I quit rabbit punching and I had to start holding my hand behind my neck, and that dirty referee continued. . . . (Tr. 146)

\* \* \* \*

"MR. COSELL: Tony Perez refereed your second fight against Joe Frazier --

"MR. ALI: And he did another dirty thing. The bell rung --- he started to say the bell rung.

"MR. COSELL: -- and Frazier and Eddie Futch, Frazier's manager, said that Perez favored you -- that you --

"MR. ALI: How could he favor me --

"MR. COSELL: -- we're holding throughout the --

"MR. ALI: How could he favor me, when they talking -- what they favor Frazier. I had the man knocked out and he was almost ready to fall and he stopped it and said the bell rung and made a mistake and the damn bell didn't ring, messing me up from knocking out Joe Frazier. I had Joe Frazier going and the world saw it, and he stopped the fight and said go to your corners pretending he thought the bell rung. That wasn't it -- he didn't want me to knock out Frazier.

"MR. COSELL: You all done?

"MR. ALI: They got lights on the pole, Bodini just said -- got lights on the pole to show -- the round wasn't over. He didn't see no lights.

"He was paid probably by some gangsters or somebody -- uh -- to --[or]-- he had some money bet on Joe Frazier. (Tr. 147-148).

\* \* \* \*

"MR. COSELL: All right, let's go on --

"MR. ALI: Let's keep --

"MR. COSELL: -- with the next highlight of the fight, the so-called knock out of the ninth round -- and I want you to observe --

"MR. ALI: He stepped on my foot. He didn't knock me down.

"MR. COSELL: We will get to that issue in just a moment. But let's take a look at the alleged knock-down and you talk over. This is ninth round --

"MR. ALI: Well, he was so dirty -- he kept stepping on my toes all through the fight. It's an old trick an old professional's got. You step on a man's toe and push. There he go -- push me down. (Tr. 149).

\* \* \* \*

"MR. COSELL: . . . . Tony Perez says that you're embarrassed by your bad showing -- and that you're taking it out on him.

"MR. ALI: Yeah, I'm embarrassed -- yeah, I'm embarrassed. I'll tell you what. You tell Tony Perez -- to meet me -- I'm tired of him. I done made you famous, I don't want to make him famous either, don't nobody know this little old referee. But all through the fight film. this man hit me illegal on up until the last knockout. This man kept hitting me behind my head, and why is it that you, on nationwide TV, why is that Tony Perez, why is it that all the boxing officials, allow this dirt on Muhammad Ali?" (Tr. 152).

#### 7. Ali's State of Mind

Ali testified that an hour before the Cosell interview he read an article by Dick Young that appeared in the New York



Daily News on March 25, 1975 (Tr. 286-287, 541-544). The article stated in part:

"'You wouldn't believe some of the stuff. Ken Sherwood, an observer, stood off to the side of the weigh-in shaking his head. Sherwood is a member of the State Athletic Commission in New York, where heavyweight title fights used to be held. 'Ref open to all kinds of trouble.'

"'Can you imagine this happening in New York?' he said. 'How can they announce the referee a day before the fight? We'd never permit it. It brings in the gamblers. It leaves the referee open to all kinds of trouble.'

"Hello, Tony? This is a friend. I understand you're working the fight tonight. We have made a little bet for you, five big ones at 20-to-1. If Wepner wins, you stand to pick up a hunnert grand. And if he doesn't win, you stand to be picked out of Lake Erie tomorrow.'" (Tr. 541-542).

Ali further testified that during the Cosell interview:

"I wasn't angry at him [Perez] . . . .  
I am angry at what he allowed and what the officials . . . . I was angry at the injustice portrayed and the foul blows, the 154 foul blows on American television right before the public and with everybody watching it and nobody really protesting." (Tr. 309).

Ali was asked at trial, by Perez' counsel, when "for the first time" he formed his belief that Perez had been paid by gangsters. He replied that:

"I was suspicious of the first Frazier fight. That was the first time. I was suspicious.

\* \* \* \*

. . . when he [Perez] was looking at the pole and the light and, the bell could be heard all over Madison Square Garden. To think he [Perez] heard a bell didn't seem right. I won the fight big. I didn't pay any attention because -- then all of that which happened, and my foot being stepped on, he didn't see it there, and calling that a knockdown which hurt me in my reputation it goes in the record book as a knockdown and it wasn't, my man kicked me in my private with his knee and he didn't see that. The film shows that. Also the illegal rabbit punches and then him seeing that I threw as much dirt after Wepner. I said that is the same guy that is in the Frazier fight. Then this is when I really started really believing it was true." (Tr. 287-288).

Ali further testified:

"I was angry at the things he allowed and the illegality and things he didn't see. I was angry that he had okayed that. That led me to believe that something was funny like this. I don't really know that he was paid. I don't really know he had a bet, but I saw no other reason a referee could side with another man and allow him to hit me 154 times. I saw no way a referee could let a man kick at my groin and not say anything.

I saw no way a referee could say I was knocked down when the fight went the distance, and was really close, I would have lost my Championship because of a referee's decision, all of this.

I said why would he be after me, the same man that made that big mistake in New York? He seemed to be after me. This is what moved me to say what I said. Not that I am angry because I know he got a phone call, I know he was paid, but in justice. It must be something. Why would he do all this to me? This has never been done in the history of a fight.

In title fights you don't do something like this. I said there must be something shady about it.



That's really what I believed. I don't know who paid him or who made the deal, but the evidence -- why is he after me? That is my attitude." (Tr. 310-311).

The reasonableness of Ali's beliefs was fully supported by Jacobs. With respect to the Frazier fight, on cross-examination by plaintiff, Jacobs testified:

"I have never seen in 16,000 fights that -- I have never seen a referee stop a fight prematurely. I have seen judges ring the bell incorrectly and also I have seen fights that go -- rounds that go two minutes being stopped one minute prematurely by the man who is called the timekeeper, but usually that judgment is always left to the timekeeper who rings the bell. I have seen that, but not a referee."\*/(Tr. 533).

Jacobs termed Perez' performance in the Wepner fight "outrageous," "completely incompatible with the other performances in the ring that I have seen Perez work" (Tr. 522). Once again, on examination by Perez' counsel Jacobs testified:

"At the time I saw the Ali-Frazier fight, I thought that Tony Perez had made a mistake and did not do it on purpose. After seeing the Ali-Wepner fight, I completely changed my opinion about the Frazier fight.

Q: What is your opinion now, sir?

A: I believe that it was a dishonest performance  
....."  
(Tr. 538)

#### 8. Ali's Physical Injuries

Ali testified that after the fight he had "two large,

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\*/Indeed, Jacobs sat in the second row during the Ali-Frazier fight and testified he did not hear a bell ring or the lights go on when Perez stopped the fight in the second round. (Tr. 519-520).



real painful lumps right on the back of [his] head" (Tr. 386), and after the fight he took pain pills. The pain lasted about six or seven days (Tr. 387). It made it hard for Ali to turn his head and neck around and, during the last five rounds of the Wepner fight, hard to throw punches (Tr. 387).

As a result of the kidney punches, Ali testified that he experienced pain in his sides and his urine was bloody. (Tr. 387-388). Ali testified that he visited a physician and was given pills. The blood in his urine lasted about ten days (Tr. 389).

#### 9. Perez' Reputation

Perez not only enjoyed a good professional reputation at the time of the Wepner fight, but he apparently enjoys one today, notwithstanding the verbal "dispute" with Ali and his performances in the Frazier and Wepner fights. James A. Farley, Jr., Chairman of the New York State Athletic Commission, testified that Perez' reputation in the community is as a "good and capable referee" (Tr. 504). Jacobs described Perez' reputation in the community as a "fine referee" (Tr. 538). William Recht, a judge for the New York State Boxing Commission described Perez' reputation as a referee as "satisfactory" (Tr. 368). Dick Young, Sports Editor of the New York Daily News, testified that Perez' reputation in the community is considered "good" (Tr. 414). Even Dundee called him a "good referee" (Tr. 425).



Perez admitted that he had continued to referee championship bouts. There was no evidence of Perez' failure to be named as referee for any bout. In short, the testimony showed no damages whatsoever to Perez.

10. The Conduct of the Trial

There is nothing in the record to indicate that the Court displayed anything other than even-handed treatment to both parties during the trial, and Perez' counsel's outrageous attacks on the Court are simply unsupported by the trial transcript references supplied.

For example, Perez' counsel charges that the Court "flagrantly and quite unfairly admonished and berated [Perez] before the jury . . . for being unresponsive" (App. Br. p. 24), presumably because Perez, a Puerto Rican, has Spanish as his native language. In the first example cited, Perez, on direct examination, volunteered an answer before the question was asked and the Court stated: "Just wait for the question. Strike that out." (Tr. 162). The second example cited involved Perez' failure to recall that in June 1975, after the Ali-Wepner fight, Perez refereed a middleweight championship bout. Perez' deposition testimony on this subject was read to him and he still could not recall. The Court then asked:

"THE COURT: The answer was read to you. Was the answer true at the time it was given?"

"THE WITNESS: I'm not sure. I'm not sure about --

"THE COURT: Did you read the deposition over after you gave it?

"THE WITNESS: Yes.

"THE COURT: Did you sign it after you read it?

"THE WITNESS: Yes.

"THE COURT: Did you swear that what was in it was true?

"THE WITNESS: Yes. (Tr. 168).

The next example of the Court's alleged berating of Perez is:

"Q Do you recall telling anyone after that fight that 'I saw the light go on' when you called the second round over?

"A I told somebody that I saw a flash.

"THE COURT: He asked you whether you told somebody that you saw the light, the ringside light.

"THE WITNESS: The answer to that is no. Thank you." (Tr. 195).

The other examples are equally disingenuous.

Similarly, there is no evidence that the Court "actively aided defense counsel in the cross-examination of Perez" (App. Br. p. 24). Indeed, two of the "examples" cited (Tr. 293, 294) occurred in the examination of Ali by Perez' counsel. As for the "examples" pertaining to Perez, the following is typical:



"Q What is your understanding, Mr. Perez, of why rabbit punches are fouls?

"A Because when they make the rules they say that that was an illegal point.

"THE COURT: That is not what he wants to know. Why do you think that they are considered to be fouls?

"THE WITNESS: I don't know what a fould [sic] -- how it became a law.

"THE COURT: You don't know the effect of a rabbit punch on another person, as a referee?

"THE WITNESS: The effect of a rabbit punch might be a bad effect.

"THE COURT: What kind of a bad effect would it have?

"THE WITNESS: I don't know." (Tr. 170-171).

Finally, there is no basis for the charge that the Court "absolutely refused to allow plaintiff's attorney to impeach the defendant's credibility in any manner" (App. Br. p. 25). Quite the contrary, the Court indulged Perez' counsel in a lengthy and often disconnected examination of Ali, and every other witness, to the point that, according to Perez' counsel, "the proof adduced severely impugned Ali's credibility" (App. Br., p. 26)\*/. Unfortunately for Perez the jury did not agree.

The specific matters on which Perez' counsel was allegedly thwarted in his effort to impeach Ali were either irrelevant or improper or, despite the Court's ruling, found their

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\*Perez' "proof" in this regard is discussed at pages 44-47 and 26-27 of Perez' brief. All of it was heard by the jury during trial.

way into the record. For example, Ali admitted that he was willing to permit Perez to referee a subsequent bout against Coopman, and Ali explained:

"I said I don't think it is right for a man not to be able to earn a living because he is on trial, and he should. I don't want to say that I am the cause of him not earning a living, so I offered him the chance to referee a fight." (Tr. 254).

To the extent that this "impugned" Ali's credibility, the evidence was before the jury.

Again, Ali denied knowing who was to referee the fight until he stepped into the ring and saw Perez. The Court refused to permit Perez to introduce into the record a photograph taken the day before of Ali and Perez' girl friend, at a time when Ali testified he had no knowledge whatsoever that Perez actually would be the referee (Tr. 249-250). This was a collateral matter, of no probative value, and in no way reflected on Ali's credibility since obviously on the day before a heavyweight championship fight many referees attend, and Ali is photographed with many persons. Moreover, Ali testified that up to that time he had not attributed any significance to Perez' conduct in the Frazier fight or to the anonymous telephone calls, so he would not have objected anyway.

In short, Perez had ample opportunity to present his entire case. Perez did so; the evidence went to the jury and it dismissed his claim.



# 11. The Court's Charge

According to Perez' counsel, defense counsel "actively misled" the Court by supporting the Court's erroneous omission in its charge of Ali's remarks to the press, after Perez' remarks to the press, on March 24, 1975 (App. Br. p. 33). In fact, the Court mentioned these remarks in its charge (Tr. 629). The alleged error is that the Court did not include Ali's remarks in its brief chronology of the evidence (Tr. 627-8) although it referred to them only seconds later by reading Perez' pleading (Tr. 629). When Perez' counsel objected, the Court asked him for the record reference (Tr. 653). Although the actual remarks were not taken down by the reporter, the record shows that a tape of the remarks was played. Perez' counsel did not produce the tape -- which he had placed in evidence -- and did nothing to end the apparent confusion (Tr. 651-657, 660).\*/ Ali's trial counsel simply confirmed that he too found no transcription of the remarks in the record (Tr. 654) and, indeed, there was none, hardly an active misrepresentation.

At the time, Perez' counsel was concerned because the Court had stated in its charge that, since Perez spoke first, only

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\*/ In fact, the record shows that after the charge the jury went to lunch and then, after lunch, commenced its deliberation (Tr. 663-4). Perez' counsel still took no action to correct the Court's "ommission."

Ali and not Perez could claim the "right of reply". (Tr. 650-651)\*/ The fact is Perez admittedly spoke first to the press, and therefore the Court's charge on this point is appropriate. At the request of Perez' counsel, the Court did amend its charge as follows:

"ladies and gentlemen. I should add, for the sake of completeness, that in connection with who initiated and what provoked the respective comments of the parties, you should also consider what, if anything, occurred or was aid by the parties to each other during the course of the Wepner fight itself, if that bears on that subject.

"If I used the word assault, it was a colloquialism and not intended to mean anything more than the propulsion of words in somebody's direction." (Tr. 661)

As to whether Perez' initial statement was innocuous, or whether Ali's subsequent remarks, at the March 24 press conference or March 29 interview were such as to cause Ali to lose the privilege of the right of reply, the Court gave a proper instruction, to which the jury responded by dismissing the claims of both sides.

In fact, the Court marshalled the evidence quite evenly. To the extent that it may have failed to refer directly to Ali's press conference, the Court did caution the jury that:

"[A]nything that I might say during the trial or refer to in these instructions as to any

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\*-/Whether Perez had a right of reply is irrelevant since Perez successfully defended against Ali's counterclaim.



matter of evidence is not to be taken in lieu of your own recollection. You determine the weight of the evidence, you appraise the credibility or worthiness of belief of the witnesses, you draw the reasonable inferences from the evidence and resolve such conflicts as there may be in evidence." (Tr. 624)

The only error the Court made in its charge was its failure to send to the jury Ali's second and third counterclaim, holding that they "essentially" related to Ali's damages for his defamation claim and discussing them as separate causes of action.

Finally, during its deliberations, the jury asked for "the statement made by Perez to the press conference" (Tr. 695). On consent of all counsel, the following statement was given to the jury:

"He [Ali] purposely did the rabbit punching. Chuck did not do it purposely. If there is one man who fought dirty last night, I think it was Ali."

"A clean knockdown. Ali tripped on his own feet but he went down from the effect of the punch, in my opinion. He's just embarrassed because a man like Wepner knocked him down." (A 696)

There was no improper conduct by defense trial counsel and there was no "obvious confusion" (App. Br. p. 42). Defense counsel indicated that there was testimony as to Perez' remarks, and he was correct (Tr. 175-180, 221-222). With Perez' counsel's consent, the jury got, as the Court put it, exactly what they asked for "nothing more and nothing less" (Tr. 665).

ARGUMENT

## I

THE CHARGE OF THE COURT  
BELOW WAS PROPER

Perez' counsel points to one purported error as being so prejudicial that it "precluded any meaningful consideration by the jury of important elements of plaintiff's proof" so that Perez is entitled to a new trial (App. Br. p. 43). This purported error is that the Court's one and one-half page summary of the evidence of four days of trial did not mention that Ali followed Perez to the microphone after Perez' post-fight interview. Perez' counsel neglects to mention that immediately thereafter in the charge the Court made direct reference to Ali's remarks (Tr. 629). The remarks were the subject of Ali's examination by Perez' counsel, the videotape of the remarks was placed in evidence by Perez' counsel, and the evidence submitted to the jury.\*/  
Finally, the Court not only gave Perez' counsel an opportunity to demonstrate that an omission had occurred - which Perez' counsel failed to do - but, further, made it clear that the jury was not to substitute the Court's recollection for that of its own. While crying foul, Perez' counsel is, in reality, asking this Court to retry the facts properly decided by the jury.

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\*/ Perez' counsel did not even regard the remarks as important enough to refer to them in his summation.



It is well settled that the trial court has the right to summarize and comment on the evidence in submitting the case to the jury so long as the jury is instructed that it determines all issues of fact and is not bound by the Judge's summation or comment. Vicksburg & M.R.R. v. Putnam, 118 U.S. 545 (1886). See also, 5A Moore's Federal Practice ¶ 51.07 at 2532. An abuse of this right sufficient to require a new trial will not be found unless the Court becomes an advocate in such a manner as to prevent the jury from exercising its function of deciding the factual issues. Starr v. United States, 153 U.S. 614, 626-628 (1894) (wherein Court advocated defendants' guilt to the jury in a long address); and Quercia v. United States, 289 U.S. 466 (1933) (wherein Judge expressed opinion that defendant was a liar).

In this case, the Court did nothing of the sort. The Court's factual summary occupied less than 1-1/2 pages (Tr. 627-629) of the 28 transcript pages encompassing the charge (Tr. 622-648, 660-662). Moreover, the Court made direct reference to Ali's immediate post-fight remarks on virtually the next page (Tr. 629). In short, Ali's remarks at the post-fight interview were properly before the jury.

To the extent that the Court did not revise its "chronology", the fault lies squarely with Perez'

counsel.\* / In the robing room, after the charge, the Court asked Perez' counsel to show him the portion of the record in which this statement was made (Tr. 653). Perez' counsel -- who placed the tape in evidence -- did not produce the tape for the Court, either in the robing room or after the luncheon recess, before the jury began its deliberations.

Perez' counsel claims that the Court's incomplete chronology mandates a new trial on the grounds that it "emasculated" the proof on the issue of malice and because the Court made it appear as if Perez initiated the verbal bout (App. Br. p. 48).

With respect to the issue of malice, Perez' counsel argues as though the jury did not hear the testimony as to Ali's remarks at the press conference or see the videotape of the press conference itself. The fact is that the jury

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\* / In Rosenfeld v. Curtis Publishing Co., 163 F.2d 660, 663-664 (2d Cir. 1947), a libel action, where plaintiff failed to make his exception to the Court's instruction clear, even though the Court provided him an opportunity to do so, Judge Clark said:

"But it seems to us it was for counsel to realize that the judge had not recalled or repeated all of what had happened and to take such steps as were necessary to bring this home to the judge. Such imprecision in asserting alleged error is destined to produce at the most only confusion as to what is in counsel's mind and what is desired of the court. We do not think a verdict justified on the evidence and by the trial generally should be upset when counsel have thus failed to make their criticisms of the judge clear to him at the time."



did hear the testimony, see the tape and considered it along with all of the other evidence on "malice" Perez presented.

As to who initiated the verbal bout, it is undisputed that Perez spoke first at the post-fight conference. It is unheard of for a referee to make the first post-fight remarks, let alone remarks critical of one of the fighters. At trial, Perez' counsel introduced the tape solely in an effort to establish a "right of reply" for Perez in defense of Ali's counterclaims (Tr. 239, 650-1), a moot issue at this point. Indeed, the Court did give a further charge, at Perez' counsel's request, that in considering who initiated the verbal bout, the jury could consider what, if anything, was said by the parties to each other during the Wepner fight (Tr. 661).

In fact, the record shows that the videotape was played for the jury and Ali was examined on these remarks and, in its charge, the Court cautioned the jury:

"anything that I might say during the trial or refer to in these instructions as to any matter of evidence is not to be taken in lieu of your own recollection." (Tr. 624).

Perez' real argument is not that the Court's pur-

ported omission was critical or prejudicial, but that the jury's verdict was against the weight of the evidence, the lament of every losing trial counsel. However, a brief review demonstrates that the evidence submitted to the jury overwhelmingly supported Ali and the trial Court's denial of Perez' motion to set aside the verdict as against the weight of the evidence.

There is ample evidence that the jury could have found that Ali's remarks were not even libelous. The specific remarks pertained to Perez' premature termination of round 2 of the Frazier fight at a time when, in Ali's view (and Jacobs' view), Ali was about to knock Frazier out. In sports, it is customary to criticize officials in strong rhetorical terms, which are never taken literally. In the context in which they were made, the jury could have attributed to them no more significance than a statement that "the umpire was blind" or "I was robbed." (See Tr. 632).

Even if the jury did not bring in its verdict for the foregoing reasons, certainly there was ample evidence for it to have concluded that Ali's belief was reasonable that Perez prematurely terminated round 2 of the Frazier fight because "he was paid probably by some gangsters or somebody or he had some money bet on Frazier." The evidence to support this view -- the ominous phone calls each time Perez refereed



(Tr. 263-4, 461-3); Perez' unexplained failure not to notice that the ring post lights had not gone on (Tr. 192-3); Perez' failure to discipline Wepner (Tr. 344-5); Perez' ruling that Ali was "knocked down" when Wepner stepped on Ali's foot (Tr. 179); and Perez' failure to rule that Wepner tried, intentionally, to kick Ali in the groin (Tr. 352-5). Jacobs called plaintiff's performance "dishonest" and "outrageous" (Tr. 538-9). Dundee called it "the dirtiest fight I ever saw" (Tr. 446). Certainly, Ali had reasonable grounds to wonder "why is he [Perez] after me?" (Tr. 311).

In short, the lament of plaintiff is that he lost the trial because, after hearing all the evidence, the jury believed Ali.



## II

THE COURT DID NOT DISPLAY  
PREJUDICE TOWARD PEREZ OR  
HIS COUNSEL

There is simply no basis for the charge that Perez was denied a fair trial by prejudicial conduct of the Court

Perez' right to cross-examine Ali, called by Perez on his direct case, was in no way restricted by the Court. Perez' counsel repeatedly attacked Ali's credibility and, even according to Perez' counsel, was able to "severely impugn" it (App. Br. p. 26). In the instances where the Court disallowed Perez' counsel's inquiries into collateral issues, the Court acted properly and well within the wide discretion it has to control the scope of cross-examination.\*/

The example, to which Perez' counsel attributes the most significance, is that the Court refused to allow examination of Ali by Perez' counsel based on an autobiography of Ali. Ali testified that he did not write it, had not worked

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\*/ See e.g., United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976) ("questions relating to the admissibility of evidence, relevancy of proffered evidence and the scope of cross-examination are all questions to be determined subject to the rules of evidence subject to the discretion of the trial Court, the exercise of which may be overturned on appeal solely upon a showing of a clear abuse of that discretion").



with its author on its preparation and had never read it (Tr. 260-261, 266-267). Perez' counsel could not establish any foundation with Ali for use of the book in his cross-examination (Tr. 358). Perez' counsel then called an attorney for the book's publisher, who testified that Ali signed a standard form contract which obligated Ali to author the book (Tr. 414-424), and part of the contract was read to the jury. At best, this shows that Ali may have breached the contract, not that he knew anything about or was responsible for the content of the book, and the Court was quite correct not to permit examination of Ali from it\*/ (Tr. 358). See 7 Wigmore, Evidence § 2129 (Chadbourn rev. ed. 1970); McCormick, Evidence § 218 (2d ed. 1972).

The Court refused to permit examination of Ali as to prior statements allegedly made to promote prior bouts because the alleged defamatory statements in this action had absolutely nothing to do with promoting any future bout. Therefore, such prior statements were irrelevant. See Fed. Rule Evid., Rule 608(b). In short, Perez' counsel was not restricted on examining Ali -- if any-

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\*/ In any event, despite the fact that Perez' counsel never established that Ali had either written or read the book, when the Court ultimately allowed counsel to read portions of the book to the jury (Tr. 423-424; 504-508), he did not even request that Ali be returned to the stand for further examination, even assuming that would have been appropriate (Tr. 474; Cf. App. Br. p. 9). Therefore, Perez was not prejudiced by the Court's original decision to exclude the evidence. United States v. Bernstein, 417 F.2d 641, 644 (2d Cir. 1969) (no abuse of Judge's discretion shown where, although criminal defense counsel was not permitted to use prior inconsistent statement on cross-examination of witness, counsel was permitted to read parts in his summation).



thing, he was indulged.

The parties were treated courteously and appropriately before the jury, and it ill-behooves Perez' counsel to make such accusations of bias against the Court without reproducing a single piece of colloquy in his brief. The citations offered hardly show participation by the Court on behalf of the defense "so pervasive that the details cannot be fully discussed."

As for uneven treatment of counsel before the jury, the very first citation offered is of a colloquy which occurred in the robing room:

"THE COURT: You are not careful at all in your speech. I have something to say to you about something you said in summation, too.

"MR. SULLIVAN: If I may just summarize --

"THE COURT: You called my attention to page 243 as something that you say related to the events immediately after the fight showing that there was something in the record concerning a speech made by Ali to press reporters, and there is just nothing on page 243 in that connection.

"MR. SULLIVAN: May I try to refresh your Honor's recollection.

"THE COURT: Are you calling my attention to page 243, or are you calling my attention to some other thing you are flitting to now?

"MR. SULLIVAN: 243 and something else that I am flitting to, your Honor." (Tr. 656)



Indeed, Perez' counsel's speech was not careful (Tr. 648-649).\*/ Counsel never did assist the Court by producing the evidence requested (see p. 22, supra).

The next alleged instance of uneven treatment before the jury also occurred in the robing room and related to an unfounded statement Perez' counsel made in his summation:

"(Jury excused.)

"THE COURT: There remains yet another matter which I would like to call to your attention.

"During the course of the summation of the lawyer for the plaintiff, my recollection is that he made the statement in referring to the testimony of the party -- of Mr. Ali, that that testimony was dreamt up by a lawyer. That is a direct accusation of professional impropriety, and the Court will await the receipt of the trial record to see exactly what the context of it was and what it stated before taking any action in connection with it." (Tr.663)

As shown by these examples and the others cited by Perez, to which this Court is respectfully referred, the Court treated both sides fairly and impartially. The jury verdict against Perez was not tainted by any bias or prejudice of the Court but was the result of evidence fully and fairly presented at trial which overwhelmingly supported Ali.

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\*/ The colloquy in the robing room related to Perez' defense against Ali's counterclaim in defamation. Despite Perez' counsel's failure to submit a charge, the Court did amend the charge requested (see p. 23, supra). This hardly was "uneven" treatment by the Court.



## III

ALI'S SECOND AND THIRD COUNTERCLAIMS  
SHOULD NOT HAVE BEEN DISMISSED

Ali's second and third counterclaims were to recover damages from Perez for his having breached his duty as a referee to enforce the rules of boxing. The second counterclaim alleged that this was an intentional and malicious act by Perez; the third counterclaim alleged that Ali was a third-party beneficiary of Perez' contract to referee. At trial, Ali testified as to the severe physical effects of the rabbit punches and kidney punches Perez permitted Wepner to inflict. The Court, however, dismissed the counterclaims without prejudice to consideration by the jury of their subject matter as an element of damages, if any, established under plaintiff's defamation counterclaim. In this the Court erred. (Tr. 551)

It is well settled that an individual may maintain a civil action for a violation of a statute or governmental regulation if he is among the class of persons whom the statute or regulation was intended to protect. See Golob v. Nauman Vandervoort, Inc., 353 F. Supp. 1264 (N.D. Ohio 1972); Pearlstein v. Scudder & German, 295 F. Supp. 1197 (S.D.N.Y. 1968), rev'd on other grounds, 429 F.2d 1136 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971); Reader v. Hirsch & Co., 197 F. Supp. 111 (S.D.N.Y. 1961); cf. Restatement (Second) of Torts



§ 286 (1965). Obviously, the primary purpose of the boxing rules is to protect the physical safety of fighters and their opportunity to win fairly the matches in which they engage, and Perez admitted this at trial (Tr. 173).

Perez' duty to referee the fight in accordance with the regulations arose not only from the legal effect of the regulations themselves but also from Perez' contract to referee the fight, which included an implicit undertaking by Perez to regulate the fight in accordance with the regulations. Since those regulations were clearly intended for the protection of the fighters (Tr. 173), it necessarily follows that Ali was intended to be a third-party beneficiary of Perez' agreement to apply them.

Ali's right to recover in this situation is clearly established in both Ohio, where the fight took place, and New York law. For example, a compelling analogy is provided by Jacques v. Dayton Power & Light Co., 80 Ohio App. 258, 74 N.E.2d 211 (Ohio Ct. App. Montgomery Co. 1947). In that case, plaintiff's decedent was killed when the truck-mounted boom he was operating came into contact with uninsulated high-voltage lines owned by the defendant power company. Previously, the power company had entered into a contract with the owner of the property on which the accident occurred which provided, inter alia, that power lines strung over the property be kept at a distance from the ground of 25 feet. At the time

of the accident, however, the lines had been allowed to sag to within 22 feet of the ground. In holding that plaintiff was entitled to recover in this situation, the court stated:

"the Eby contract may be the basis of the tort action of the plaintiff against the defendant on the theory that her decedent was a third party for whose benefit the contract was made . . . . The Eby contract was made not only for the protection of the owner of the land but for those who by his invitation were on the land about their business which may have been for the mutual benefit of the owner and the lessee of the land."  
74 N.E.2d at 214.

Similarly, in Vail v. Reuben H. Donnelly Corp., 56 Ohio App. 219, 10 N.E.2d 239 (Ohio Ct. App. Hamilton Co. 1937), it was held that a telephone subscriber was a third-party beneficiary of defendant's contract with the telephone company to compile directories and was, therefore, entitled to damages caused by the omission of his name from the classified section of the directory. Cf. Horn v. Oglesby, 166 Ohio St. 45, 139 N.E.2d 10 (Ohio Sup. Ct. 1956) (passenger injured in elevator accident held entitled to recover from the company which had contracted to inspect and maintain the elevator); Mallor v. Wolk Properties, Inc., 63 Misc.2d 187 (Sup. Ct. N.Y. Co. 1969) (passenger injured in elevator accident entitled to recover from maintenance contractor).



Since, as discussed above, the primary purpose of the applicable boxing regulations is to protect the physical safety of the fighters and to insure that fights will be judged and scored fairly, it is obvious that Ali was an intended beneficiary of Perez' contractual undertaking to referee the Ali-Wepner fight in accordance with those regulations. Ali established at trial that Perez did, in fact, breach his obligation, that Ali sustained serious physical injury and, therefore, this issue should have been submitted to the jury.

Conclusion

For the foregoing reasons, the judgment against Perez should be affirmed. The judgment dismissing Ali's second and third counterclaims should be vacated, and those counterclaims should be remanded for a new trial.

Respectfully submitted,

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Service of three (3) copies of the within

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